SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 396

WILLIAM P. ROGERS, ATTORNEY GENERAL,
Petitioner,

v.

JIMMIE QUAN, ALSO KNOWN AS QUAN DUNG NGOON, JOW MUN YOW AND JOW KWONG YEONG, YEN MOK, AND LAM WING,

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Statement.

Respondents are each natives of China who arrived in the United States variously from 1949 to 1954, four of them prior to December 26, 1952. (R. 2, 5, 12). They each were ordered excluded from the United States. Notwithstanding these orders they were paroled into the United States after varying intervals in detention. Yow and Yeong were paroled July 22, 1952, having arrived October 21, 1951;

(R. 5). Yen Mok arrived in December, 1954 and was thereafter paroled. Quan arrived in 1949 and Lam Wing in April, 1952, but the record does not disclose when either was paroled into the United States. Deportation of the respondents was not attempted until 1955. Each of the respondents alleged in complaints filed in the United States District Court for the District of Columbia that petitioner had designated Communist China as the place to which they were to be deported, and that he was threatening to deport them to Communist China by way of Hong Kong,[1] that the respondents had each applied for stays of deportation to that country upon the ground that if deported to Communist China, as anticommunists, they would be subject to physical persecution. Petitioner refused to consider the applications upon the ground that such claims may not be asserted in "exclusion cases." (R. 2, 6, 9, 13, 15). Quan also alleged that he had requested continuation of his parole in the United States and that the petitioner "arbitrarily and contrary to law refused to exercise discretion to permit (him) to remain in the United States." (R. 2)

The District Court dismissed the complaints both for lack of jurisdiction and for failure to state a claim upon which relief may be granted (R. 4, 8, 11, 16). The first ground

[1] Petitioner states (Pet. 4, fn. 2) that respondents were ordered excluded and deported to the place whence they came, Hong Kong. There is nothing in the record to support this. The allegations that the place of deportation is Communist China are undenied. Moreover, the Service has indicated its inability to deport excluded Chinese aliens, (see Infra at page 21) by its policy of paroling "nondeportable Chinese" into the United States after detention. Circular Letter (File 56204/81), March 29, 1950, Immigration Manual, p. 5170-1. The method of effecting deportation as to aliens treated under Section 243 of the Act is set forth in an affidavit of Frank H. Partridge, Assistant Commissioner, Enforcement Division, Immigration and Naturalization Service, which was filed by the petitioner in *Alfred Dodge Lu* v. *Rogers*, Civil Action 3766-56, in the United States District Court for the District of Columbia, and reproduced in the appendix herein at page 41. It is assumed that the same method is used for deporting excluded aliens to China.

was conceded to be error below following the decision of this Court in *Brownell* v. *Tom We Shung*, 352 U. S. 180. The second ground was set aside by the United States Court of Appeals for the District of Columbia Circuit in a holding that the respondents were aliens within the United States within the meaning of Section 243(h) of the Immigration and Nationality Act of 1952, 66 Stat. 212, 8 U.S.C. 1253. That Court did not decide the issues whether the four respondents who arrived in the United States prior to the 1952 Act were reached by Section 20 of the Immigration Act of 1917 as amended by Section 23 of the Internal Security Act (64 Stat. 1010, 8 U.S.C. 156), or whether, as to Quan, the refusal to exercise discretion under Section 212(d)(5) of the 1952 Act, 66 Stat. 188, 8 U.S.C. 1182(d)(5), states a cause of action.

Question Presented

Whether aliens who have been ordered excluded from the United States but who have been released from detention and have been paroled into the United States are aliens "within the United States" whose deportation may be withheld by the Attorney General to a country in which the aliens would be subject to physical persecution.

Statutes and Regulations

Section 18 of the Immigration Act of February 5, 1917 (39 Stat. 887; 45 Stat. 1551; 54 Stat. 1238; 8 U.S.C. 154), provides as follows:

> "Immediate deportation of aliens brought in in violation of law; cost of maintenance and return.
>
> "All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country

whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came. It shall be unlawful for any master, purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the cost of their maintenance while on land; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; * * *"

Section 23 of the Internal Security Act of 1950 (64 Stat. 1010) amended section 20 of the Immigration Act of February 5, 1917 (8 U.S.C. 156) to read as follows:

"Sec. 20(a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States or to the country in which such alien embarked for the United States or for foreign contiguous terri-

tory; or to any country in which he resided prior to entering the country from which he entered the United States or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such alien is a subject, national or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. . . . No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Section 212(d)(5) of the Immigration and Nationality Act of 1952 [66 Stat. 188; 8 U.S.C. 1182(d)(5)] reads as follows:

"The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served, the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Section 237 of the Immigration and Nationality Act of 1952 (66 Stat. 201; 8 U.S.C. 1227) reads as follows:

"Immediate deportation of aliens excluded from admission or entering in violation of law—Maintenance expenses.

"(a) Any alien (other than an alien crewman), arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deporation is not practicable or proper. The cost of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained, as well as the transportation expense of his deportation from the United States, shall be borne by the owner or owners of the vessel or aircraft on which he arrived . . ."

Section 243 of the Immigration and Nationality Act of 1952 (66 Stat. 212; 8 U.S.C. 1253) provides as follows:

"Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country.

(a) The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States . . . Thereupon deportation of such alien shall be directed to any country of which such

alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Section 405(a) of the Immigration and Nationality Act of 1952 (66 Stat. 280, 8 U.S.C. 1101 Note) provides in part:

"Sec. 405(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits,

actions, proceedings, statutes [statuses], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act, are, unless otherwise specifically provided therein hereby continued in force and effect."

8 Code of Federal Regulations § 212.5 Provides:

"*Parole of aliens into the United States.* The district director in charge of a port of entry may, prior to examination by an immigration officer, or subsequent to such examination and pending a final determination of admissibility in accordance with sections 235 and 236 of the act and this chapter, or after a finding of inadmissibility has been made, parole into the United States temporarily in accordance with section 212(d)(5) of the act any alien applicant for admission at such port of entry under such terms and conditions, including the exaction of a bond on Form I-324, as such officer shall deem appropriate. At the expiration of the period of time or upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director in charge of the area in which the alien is located that neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole, and further inspection or hearing shall be conducted under section 235 or 236 of the act and this chapter, or any order of exclusion and deportation previously entered shall be executed."

Summary of Argument

The issue here is whether the statutory authority reposed in the Attorney General to stay the deportation of an alien in the United States to a country in which he would be

subject to physical persecution applies to an alien who has been excluded from admission but who has been released from detention and has been paroled into the United States.

The statute by its express terms authorizes the Attorney General to withhold such "deportation of any alien within the United States".

Petitioner's argument that these words do not mean what they plainly say is derived principally from his view that Section 243 of the statute (in which the relevant clause appears) applies exclusively to aliens who are ordered expelled from the United States and that Section 237 sets forth the sole method of deporting excluded aliens.

That this cannot be so appears from the provisions of the two relevant sections. Section 237 provides only for the immediate deportation of excluded aliens and only for those aliens excluded under the Immigration and Nationality Act of 1952. Authority for the deportation of excluded aliens, whose deportation has not been effected immediately, or who are excludable under other acts, must be sought in Section 243 where appear the only other provisions relating to methods of deportation. Contrary to petitioner's position, Section 237 cannot encompass all excluded aliens and Section 243 cannot be limited to expellable aliens.

The weakness of petitioner's position is made the more apparent by the methods of construction he must use to support it. He must explain away the use of the term *deportation* in Sections 237 and 243 to establish that its meanings in the two sections are different. If the meanings are the same, there is no basis in the statutory language for his argument. Petitioner therefore says that in Section 237, the term *deportation* is used in a colloquial sense, but in Section 243, in a technical and legal sense. His method here is contrary to the teaching of *Brownell v. Tom We Shung*, 352 U.S. 180, 185, in which "chameleonic" definitions were rejected as to another word in the same statute.

Petitioner must also substitute the word "chapter" for the statute's use of the language "in this Act or any other Act or treaty" in order to sustain his argument that Section 243 applies solely to expellable aliens. Petitioner's word "chapter" would limit Section 243 to aliens deported after expulsion proceedings. The statute's phrase, however, clearly includes aliens who are deported after orders of exclusion. Petitioner's device here, scarcely one to be justified under any principle of statutory construction, has specifically been refused acceptance as to this statute in *United States* v. *Minker*, 350 U.S. 179, 185, 186.

Petitioner's third problem is to place the respondents outside of the United States although they have been paroled physically into this country after being released from detention at ports of entry. This he solves by imparting a meaning to the parole provisions of the statute, Section 212(d)(5), which it does not have, and by resort to a legal fiction which he says is justified by decisions of this Court.

The parole provisions of the statute provide that parole shall not be regarded as *admission* into the United States. Petitioner argues that this precludes treatment of the respondents as being physically within the United States. It suffices to say that physical presence in the United States is not equivalent to admission, a response which is borne out by the specific requirements which must be met before an alien can be *admitted*. (Cf. Section 211(a)). Those requirements bear no relation to the issue whether aliens are "within the United States".

The reliance which the petitioner has placed upon the decisions of this Court, respondents believe, is misplaced. Three of the decisions, *Ekiu* v. *United States*, 142 U.S. 651, *United States* v. *Ju Toy*, 198 U.S. 253, and *Shaughnessy* v. *Mezei*, 345 U.S. 206, involved aliens who were in detention at the threshhold of entry and who had been denied permission to land. The issues were whether the procedures

authorized by Congress were due process. Here the aliens have been denied admission, but not permission to land for they have been released from detention at ports of entry and have been paroled into the United States. Thus the posture of the aliens is far different and the issue to be decided is far simpler than in the cases cited by petitioner.

The fourth case, *Kaplan* v. *Tod*, 267 U.S. 228, posed questions of statutory construction different from those here. One was whether a person was "dwelling" in the United States so as to acquire citizenship although inadmissible as a legally landed immigrant. The second was whether such a person, who had been paroled into the United States because of inability to effect deportation, had "entered" and was "found" in the United States in violation of the immigration laws so as to obtain the benefit of a statute of limitations barring deportation. Neither question bears on the issue here where the sole relief sought is respite not from deportation itself but from deportation to a country where respondents will be subject to physical persecution.

Policy considerations, which have been posed by the petitioner, do not bar the respondents from this relief. Excluded aliens may well have as long a residence in the United States and as much identification with its institutions as expelled aliens. Moreover, the traditions of political asylum are deeply rooted in American history.

The four respondents who arrived in the United States prior to the Act of 1952, in any event, are governed by the provisions of Section 23 of the Internal Security Act, if their applications for stays of deportation are not authorized under the 1952 Act. That Act, which has no requirement that the aliens be "within the United States", includes excluded aliens because they are deportable under "any provision of the Act".

ARGUMENT

The issue here, as petitioner states (Gov't, 11) [2] is wholly one of statutory construction. The statute [3] to be construed authorizes the Attorney General

> "to withhold *deportation of any alien within the United States* to any country in which . . . the alien would be subject to physical persecution . . ." (Italics supplied)

The precise questions to be resolved therefore are (1) whether the term *deportation* includes aliens deportable under orders of exclusion as well as those under orders of expulsion; (2) whether the phrase *any alien* encompasses an alien ordered excluded as well as one ordered expelled, and (3) whether an alien who has been "paroled into the United States" is an alien *within the United States* for the purpose of securing a stay of deportation upon the ground of physical persecution.

I

The Term Deportation in Section 243(H) Applies Both to Aliens Ordered Excluded and to Those Ordered Expelled.

As to the first question, petitioner urges that the term *deportation* is used "in the colloquial sense" when applied

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[2] Petitioner's argument is set forth in his brief as respondent in the companion *Leng Ma May* case, No. 105. References to "Gov't" are to that brief.

[3] Four of the respondent aliens arrived in the United States prior to the effective date of the Immigration and Nationality Act of 1952. Their applications for stays of deportation, respondents urged below, were governed by Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U.S.C. 156, by reason of the savings clause contained in the 1952 Act, 66 Stat. 280, 8 U.S.C. 1101 Note. See *United States* v. *Menasche*, 348 U.S. 528. The Court below apparently felt it unnecessary to reach that issue in view of its construction of the 1952 Act and its application to the respondents.

to exclusion, but in a "legal and technical sense" when applied to expulsion. (Gov't. 13). His argument is that the difference in meaning is justified by the legal distinction between exclusion and expulsion [4] and that the two processes are structurally delineated in different chapters of the Immigration and Nationality Act. (Gov't. 13, 14)

The short answer to this proposition is given in *Brownell* v. *Tom We Shung*, 352 U.S. 180. In response to the identical argument made there to support divergent meanings for the word *final* in exclusion and in expulsion proceedings, the Court replied:

> "But to darken the meaning of the word "final" as used by Congress by giving it chameleonic characteristics is to indulge in chop logic." (P. 185)

Nowhere in the Act, or in its legislative history, is there any suggestion that the term *deportation* takes on any meaning different for excluded aliens than for those expelled. As the Court below pointed out (R.-19), the very section of the statute which gives the Attorney General the authority to exclude also gives him the power to deport an alien [5] by the use of the verb *deport*. Section 236(a), 66 Stat. 200, 8 U.S.C. 1226(a).

The term *deportation* first appears in the statute at Section 237(a), 66 Stat. 201, 8 U.S.C. 1227(a). That section provides that an alien "who is excluded under this Act shall be immediately deported to the country whence he came . . . unless the Attorney General concludes that *immediate*

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[4] Whether the distinctions between exclusion and expulsion are what they were in 1892 when *Ekiu* v. *United States*, 142 U.S. 651, was decided is not as certain as petitioner suggests. See Note 1, *Brownell* v. *Tom We Shung*. In any event, the differences are not relevant to this case for we are concerned not with whether the procedure authorizd by Congress is due process, but rather with what Congress authorized.

[5] This Court learned that the power to exclude is not always the ability to deport in *Shaughnessy* v. *Mezei*, 345 U.S. 206.

deportation is not practicable or proper." (emphasis supplied)

The identical word is used again at Section 243, 66 Stat. 214, 8 U.S.C. 1253, with nothing to indicate that its meaning is different, legally, technically, or colloquially. The sole difference in the use of the term *deportation* in Section 237 from that of Section 243 is derived not from nuance, but from the omission in Section 243 of the adjective *immediate*.

The significance of the two sections, as appears from its provisions, is twofold. First, it is to direct the immediate deportation of an excluded alien, with discretion reposed in the Attorney General, however, to delay deportation when not "practicable or proper." Second, it is to differentiate the method of deporting an excluded alien who is deported immediately from the manner of deporting *any* alien whose deportation is not accomplished forthwith.

The directive in Section 237(a) links immediate deportation to "the country whence (the excluded alien) came . . . on the vessel or aircraft bringing him . . .". This is to be compared with the provisions of Section 243(a) which permit deportation to any country of the alien's choice (with exceptions), or to that of his place of birth, residence, or citizenship, as well as to the country from which he came.

The reasons for requiring deportation to the country whence ~~the alien has come~~ when deportation is immediate, but permitting latitude when deportation is delayed, are not hard to find. For where there is immediate deportation, the alien presumably has the same ability to re-enter the country whence he came as he had in the first instance to enter it. It is the country, in any event, in which he has had his most immediate nexus, the country, which as a

passer of an unwanted alien, to which the United States would look for redelivery.

But in the interval between immediate and delayed deportation (in the present cases, the delay between arrival in the United States and the attempt to deport extended for as much as six years. See Complaint of Jimmie Quan, R. 2, 3), many considerations may arise to thwart the return of an excluded alien, not the least of which is the sheer refusal of the country to accept the alien. See Reciprocal Arrangement of 1949, United States and Canada, on file, Central Office, Immigration and Naturalization Service, Washington, D. C.

The problems which the petitioner has detailed in his recital of the legislative history of Section 23 of the Internal Security Act, supra, (Gov't. 14-17) pertain no less to aliens who are deportable because they have been excluded than they do to those who are deportable because they have been ordered expelled. See *Shaughnessy* v. *Mezei, supra.* Thus there is clear warrant in the legislative history of the predecessor clause of Section 243, contrary to the viewpoint of the petitioner, for finding that its provisions apply also to deportations of those excluded aliens who are not immediately deported.

Indeed, as the District of Columbia Circuit found in construing the predecessor clause in Section 18 of the Immigration Act of 1917, 39 Stat. 887, 8 U.S.C. 154, far from being the exclusive statutory authority for deporting excluded aliens, Section 18 provides only for such deportation when it is immediate. When deportation is not immediate, the statutory authority must be found elsewhere. In the 1917 Act, the District of Columbia Circuit found it in Section 20. *Ng Chong* v. *McGrath*, 91 U. S. App. D. C. 131, 202 F. 2d 316 (D. C. Cir. 1952). A fortiorari, in the 1952 Act, it is in Section 243.

The term *deportation* therefore necessarily carries the same meaning wherever it appears in the statute, particularly in an act which seems singularly free from colloquial language. In the absence of an express qualification, not present here, the same words in different parts of a statute are assumed to have the same meaning throughout. *Pampanga Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218.

Moreover, petitioner's own regulations reflect the same usage of the term as the Court below adopted. For, as that Court stated, Section 237.1, Title 8, Code of Federal Regulations (1952) refers to the "immediate deportation of an excluded alien," and a "determination that immediate deportation is not practicable or proper", while the part is itself entitled "Deportation of Excluded Aliens".

In view of the foregoing, the conclusion must be inescapable that the term *deportation*, as used in Section (243(h), includes both excluded aliens and aliens ordered expelled.

II

The Phrase "Any Alien" Includes Aliens Ordered Excluded from the United States

Petitioner's answer to the second question—whether the phrase *any alien* in Section 243(h) includes excluded aliens—rests upon the same ground as his treatment of the first question. He suggests, as we have noted, that Section 237 provides the exclusive method for removing excluded aliens from the United States, while Section 243 is exclusively for expelled aliens. (Gov't. 13, 14)

That the petitioner's contention is incorrect is shown by the explicit language contained in the two sections.

Section 237(a) expressly limits immediate deportation to

any alien "who is excluded under *this Act*." (Italics supplied). By its terms, therefore, Section 237 cannot be made to reach aliens who have, as have four of the respondents, been excluded under other Acts.[6] It is Section 243(a) which reaches those aliens, if they are in the United States, a point which we discuss below. For it provides:

> "The deportation of an alien in the United States provided for in this Act, *or any other Act or treaty* shall be directed by the Attorney General . . ." (Italics supplied).

Contrary to petitioner's argument, Section 243 cannot be limited to expelled aliens, for it is the very source of the authority to deport aliens who have been excluded under other acts or treaties.

Moreover, the statute makes it clear in other clauses that the phrase *any alien* in Section 243 is not confined to aliens ordered expelled, and that Section 237 is not comprehensive as to all excluded aliens.

For example, Sections 237 (b) and (c) refer to "any alien deported under this section", which requires immediate deportation. Subsection (d) similarly refers to "any alien deportable under this section".

Section 243(a), on the other hand, refers to the deportation of "an alien in the United States (which is) provided for in this Act, or any other Act or treaty." Subsection (b) refers to "any alien who is deportable under any law of the United States."

The decision of this Court in *United States* v. *Minker*, 350 U. S. 179, 185, 186, respondents believe, has foreclosed this aspect of petitioner's argument. In resolving the

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[6] The four respondents who arrived prior to December, 1952 were not excluded under "this Act", the Immigration and Nationality Act of 1952, but under the Act of 1917. (R. 2, 5, 12)

question whether the subpoena power contained in the present Act at Section 235 in Title II, relating to immigration, extends to investigations under Title III, relating to naturalization, the Court declared:

> "Throughout this statute, the word 'Act' is given its full significance. The word embraces the full statute. On the other hand and when only a particular title is referred to, it is designated as such, and when the reference is to a section, that word is employed. No justification appears for treating 'Act' in Section 235 —as meaning section."

Nor does any justification appear here. Had Congress chosen to limit the operation of Section 243 to aliens who are ordered deported under the provisions of Chapter 5, the limiting word "chapter" would have been used, rather than the all-encompassing phrase, "in this Act, or any other Act or treaty", or the phrase, "under any law of the United States".

The force of this argument, it should be noted, has been recognized by the petitioner. He states (Gov't. 25) "If the *Ng Lin Chong* decision can be justified at all, it is only on the basis of ambiguities (Cf. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6) (citation supplied) in the prior statute. . . . The earlier provision referred to deportation "under any provisions of this *chapter;* and the chapter included exclusion provisions as well as those pertaining to deportation proper".

Although Section 243(h) replaced the *chapter* phrase with "within the United States," it can scarcely be maintained that new language is more limiting than the old. In any event, the rationale of the petitioner's concession vitiates his contention (Gov't. 14) that Section 243(h) is

"the last subdivision of a . . . section which . . . was obviously not intended as a directive applicable to excluded aliens."

That Section 243 is concerned with excluded aliens is indicated also by the phrasing of 243(g). It provides for specified sanctions against any country which refuses to accept the "*return* of any alien who is a national, citizen, subject or resident thereof . . ." The word "return" coupled with the phrase "any alien", it cannot be disputed —especially not by the petitioner in view of his predecessor's experience with the excluded alien in *Shaughnessy* v. *Mezei*,[7] *supra*—includes the "physical transportation" (Gov't. 12) of both excluded and expelled aliens out of the United States.

As the last subdivision of a section which is replete with indications that it is designed to encompass the deportation of *any* alien deportable under *any* statute, the context of Section 243(h) alone indicates that it is intended to include excluded aliens.

But apart from all of the considerations which we have discussed, respondents submit that the phrase "any alien", standing alone in Section 243(h) is broad enough to bring excluded aliens within its reach. If there is doubt about its breadth then the very doubt makes it ambiguous, a factor which would resolve the doubt in respondents' favor. *Fong Haw Tan* v. *Phelan, supra; United States* v. *Minker, supra.*

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[7] Attempts were made there to deport an excluded alien (who had not been permitted to land but who was temporarily removed and detained at the port of entry (See Section 15, Immigration Act of 1917, 39 Stat. 885 as amended, 8 U.S.C., 151)) to France, whence he had debarked and so "may have come", to the United Kingdom, in which he claimed to be a national, and to Hungary, where he had visited and whence, therefore, he may have come and where he may have had citizenship. (208, 209)

III

Aliens Who Have Been Paroled Into the United States Are "Within the United States" Within the Meaning of Section 243(h).

Petitioner's final argument is that the respondents are not "in the United States" within the meaning of Section 243(h). It is based upon three grounds: (A) that respondents were permitted to remain here on sufferance for their own benefit; (B) that the provisions of 212(d)(5), 66 Stat. 198, 8 U.S.C. 1225, dictate the conclusion that the respondents "in legal contemplation" are not within the United States, and (C) that the rulings of this Court in *Kaplan* v. *Tod*, 267 U. S. 228; *United States* v. *Ju Toy*, 198 U. S. 253, and *Ekiu* v. *United States*, *supra*, even without the statute, hold that mere physical presence in the United States does not change the status of an alien applying for admission.

We deal with these contentions seriatim.

(A) The suggestion that respondents were paroled into the United States on sufferance for their own benefit is not supported by the record in this case. For all that appears, the respondents might have been paroled into the United States, as was Jew Sing (*Sing* v. *Barber*, 215 F. 2d 906, certiorari granted, 348 U. S. 910, judgment vacated as moot, 350 U.S. 898 in No. 18, October Term, 1955 of this Court) in order to be naturalized as a United States citizen or as were the aliens in *Ng Lin Chong* v. *McGrath*, *supra*, to be prosecuted for making false claims of citizenship and thereafter to be sentenced to imprisonment, or as was the alien in A-5986659, Immigration Naturalization Service, November 14, 1946 (Anderson), for the purpose of rejoining his unit as a member of the United States Armed Forces (See Immigration Manual, Immigration and Naturalization Service, 1946, p. 5170), or for "such

other exceptional (reasons for) which to do otherwise would be inhuman or hold the Service up to ridicule", *ibid*, at 5169-70; or in order to be granted "political asylum". (See White House Statement, December 2, 1956 regarding Hungarian escapees, New York Times p. 36, cols. 3 and 4); or for any other reason regarded by the petitioner as emergent or in the public interest. Cf. Section 212(d)(5) supra.

What we know as to the reasons for paroling aliens, who are in the respondent's position, that is, who are Chinese nationals who have been ordered excluded from the United States, we glean from the annual reports of the Immigration and Naturalization Service, and from a Circular Letter of the Service.

In its Circular Letter (File 56204/81, March 29, 1950), Immigration Manual, supra, at p. 5170.1, the Service authorized "until further notice, the parole of certain nondeportable (sic) Chinese excluded by a board of special inquiry".

The following year, in Annual Report of 1951, the Service reported at page 62 that "Travel documents for China and the iron-curtain countries of Europe are practically impossible to obtain".

By 1953, the Service had "an accumulation of 600 Chinese under orders of deportation because of inability to procure travel documents for deportation to China". *Annual Report*, 1953, p. 43.

At the same time, the Service reported that:

> ". . . Chinese aliens who were excluded . . . upon seeking admission to the United States not only comprised the largest group of aliens held in the San Francisco detention facility, but remained longer than any other group . . . As a result, there were many unusual problems relating to their care and treatment, in-

cluding the necessity of providing separate living quarters and a special diet." p. 46

In 1954, the Annual Report noted: "In San Francisco protests relative to the care and treatment of Chinese aliens in detention have virtually disappeared." p. 37

In 1954, however, the policy of the Service regarding detention and parole underwent a major change. The 1955 Annual Report states:

> "Detentions of aliens were at the lowest figure in the history of the Service at the close of 1955. This was accomplished through a new detention policy begun in November, 1954, under which only those aliens likely to abscond and those whose release would be inimical to to the national security are detained . . .". p. 6.

By 1956, the Service was able to report (Annual Report, 1956, page 6) that the detention of excludable aliens "which had averaged close to 225 monthly prior to the new program, dropped to a monthly average of less than 40".

Petitioner's argument that the respondents should not obtain any benefit by reason of their physical presence in the United States because their presence by parole has been by sufferance and for their own benefit is thus supported neither by the record below nor by the available information. To the contrary, in the light of the inability to the Service to obtain travel documents to China, the special problems of housekeeping involved for Chinese aliens in detention, and its determination to keep in custody only potential absconders and security risks, the physical presence of the respondents in the United States, as distinguished from their detention at a port of entry (Cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *Shaughnessy* v. *Mezei*, *supra*), would seem to be as much for the benefit of the petitioner, as it might have been for respondents.

(B) The defect in the petitioner's second contention, that the language of Section 212(d)(5) bars treatment of the respondents as aliens who are within the United States, —appears from the very clauses he has chosen to emphasize. (Gov't. 20).

Parole, petitioner emphasizes first, shall not be regarded as an *admission* of the alien. From this language, it is argued, respondents' physical presence cannot transform their "status in any respect", "in legal contemplation" they are not within the United States, and they are not "entitle(d) to special treatment.". (Gov't 19, 20).

Petitioner has failed to note the proper significance of the word *admission* which derives from precise and explicit requirements elsewhere in the statute. At chapter 2— "Qualifications for Admission of Aliens," Section 211(a), 66 Stat. 181, 8 U.S.C. 1181(a), provides that "no immigrant [9] shall be *admitted* into the United States unless at the time of application for admission, Cf. Section 101(a)(4), 66 Stat. 166, 8 U.S.C. 1101(a)(4); he meets specified conditions.[10]

Clearly, the purpose and the effect of the word *admission* in 212(d)(5) is to bar treatment of an alien who has been paroled into the United States as one who has met the admission demands of Section 211(a), and by reference, the requirements also of Chapter 3, 66 Stat. 191, 8 U.S.C. 1201,

[8] It should be noted that two of the respondents were paroled into the United States prior to the 1952 Act. (R. 5); one was paroled afterward. (R. 9). The Record is not clear as to the remaining respondents.

[9] Aliens who are nonimmigrants must meet the requirements of section 101(a)(15), 66 Stat. 167, 8 U.S.C. 1101(a)(15). Note Section 212(d)(3), 66 Stat. 187, 8 U.S.C. 1182(d)(3), which permits *admission* of nonimmigrants despite inadmissibility.

[10] The conditions include possession of valid immigrant visa, being properly chargeable to the specified quota and to the proper status under the quota, unless a nonquota immigrant, and being "otherwise admissible under this Act".

relating to the issuance of valid immigrant visas, if the alien is an immigrant, or the requirements of Section 101 (a)(15) if the alien is a non-immigrant.

Petitioner's attempt to equate physical presence with admission into the United States thus cannot be supported by the kind of analysis which the statutory language requires. Reliance upon such phrases as "special treatment", or "transform(ed) status", or "in legal contemplation (not being) within the United States" cannot resolve the question whether the respondents are within the United States for the specific purpose of securing a stay of deportation to a particular country upon the ground of possible physical persecution.

The second clause which the petitioner emphasizes provides that when the purposes of the parole have been served, the alien shall be returned to the custody from which he was paroled and "*thereafter* (emphasis supplied) his case shall continue to be dealt with in the same manner as that of any other applicant for admission".

Respondents emphasize the word *thereafter* because the plain meaning of the clause indicates that it is only *after* the alien has been returned to his former custody that he shall be treated in the same manner as any other applicant for admission. It may well be, if this Court is to adhere to its decision in such cases as *Knauff*, *supra*, and *Mezei*, *supra*, that after the respondents are returned to custody, they will not be "within the United States". But that issue cannot be reached unless there is a return to custody, a factor not present here.

Respondents suggest that the petitioner may well concede the validity of their position as to this issue in view of a recent amendment of the relevant regulations.[11]

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[11] Petitioner's brief is dated March, 1958, and its authors may have been unaware of the change in regulations.

On January 8, 1958, 8 C.F.R. 212.5 was amended to provide inter alia: (Federal Register, pp. 140, 142)

> ". . . Parole shall be terminated upon written notice to the alien and he shall be *restored to the status* which he had at the time of parole, and further inspection or hearing shall be conducted under Section 235 or 236 of the Act and this Chapter, or any order of exclusion and deportation previously entered shall be executed."

The prior regulation, in addition to its differences in other ways, adhered to the statutory phrase *return or be returned to custody* in place of the newly-adopted "restored to status" clause. 8 C.F.R. 212.9, (1952 Ed.)

In his own regulations, therefore, the petitioner recognizes that there is a "transformation of status", a transformation, true enough, which may be undone by a "restoration" to a prior status. An excluded alien, thus may have the status of an alien who has been temporarily removed and held in custody at a place of detention (Cf. Section 233, 66 Stat. 197, 8 U.S.C. 1223), or the status of one who has been paroled into the United States. The first may bar presence in the United States; the second does not.

The nature of status, of course, is varied, perhaps as varied as are the many postures of aliens in (or out of) the United States. There is status as an alien, *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 586; as a nonresident enemy alien, *Johnson* v. *Eisentrager*, 339 U. S. 763; as a resident enemy alien, *Shomberg* v. *United States*, 348 U. S. 540, 547, fn. 5; as an alien who has entered the United States as a national, *Barber* v. *Gonzalez*, 347 U. S. 637; as an alien eligible for citizenship, *Heikkila* v. *Barber*, 345 U. S. 229, 236; as a resident alien physically present in the United States (notwithstanding detention at the threshhold of entry), *Kwong Chew* v. *Colding*, 344 U. S. 590, 600; and as

an excluded alien who has not been permitted to land, *Knauff v. Shaughnessy*, supra, and *Shaughnessy v. Mezei*, *supra*.

In the case of aliens who have been ordered excluded, but who have been paroled into the United States (as distinguished from being temporarily removed from a vessel to a place of examination or detention, See Section 233(a) and (b), *supra*), very plainly a status is conferred upon them as aliens who are "within the United States".

The rights they have may be limited. They are not "admitted aliens". (Cf. Section 211(a), *supra*). They are not aliens who are "dwelling" in the United States so as to be eligible for citizenship. (Cf. *Kaplan v. Tod*, *supra*). They may not be aliens who have "entered" the United States (Cf. Section 101(a)(13), 66 Stat. 167, 8 U.S.C. 1101(a)(13)) so as to be subject to expulsion rather than exclusion proceedings (Cf. Section 242, 8 U.S.C. 1226 as opposed to Section 242, 8 U.S.C. 1252(b), or so as to be eligible for suspension of deportation (Cf. Section 244, 8 U.S.C. 1254); or so as to obtain the benefit of the running of a statute of limitations to preclude their deportation (Cf. *Kaplan v. Tod*, *supra*). And no claim is made that they are aliens who have a "right to enter", either while their "right to enter" is under debate, *United States v. Ju Toy*, *supra*, or until arrangements can be made for departure, *Shaughnessy v. Mezei*, *supra*.

But that they are aliens who are "within the United States" cannot be doubted. That status itself, without more, is sufficient to confer upon them the limited benefits of Section 243(h), that is, eligibility which Congress has authorized for stays of deportation to a particular country upon ground of physical persecution. This confers no right to remain in the United States, nor even a right not to be deported to another country, but merely the narrow statu-

tory right to avoid deportation to a country in which the aliens would be subject to physical persecution.

The Immigration and Naturalization Service has interpreted Sections 262 and 265 of the Act (8 U.S.C. 1302, 1305), which refer to "every alien now or hereafter *in the United States*" and "who is *within the United States*", so as to require aliens who are paroled under Section 212(d)(5)[12] to be fingerprinted, registered, and to provide notices of changes of address. (Italics supplied) See Immigration Form 220.

It should be noted that Congress also in subsequent legislation has regarded persons paroled into the United States as being "within the United States". Public Law 85-316, 85th Congress, 71 Stat. 639 provides at Section 4(d) that "an alien who was paroled into the United States under Section 212(d)(5)" may have his status adjusted to that of a lawful permanent resident if "at the time of his arrival in the United States (he) was an eligible orphan . . . and was, or thereafter has been, adopted by the United States citizen and spouse in a court of proper jurisdiction."

By its reference to a "court of proper jurisdiction" as to orphans who have been adopted after arrival in the United States, Congress clearly contemplated that aliens who are paroled into the United States are within its borders, for without such presence there could be no courts of competent jurisdiction to enter adoption decrees for eligible orphans. See *Vernier, American Family Laws*, Vol IV, pp. 293-4.

In view of the use in Section 212(d)(5) of the word *admission*, the statutory language involved in *United States*

[12] Excluded aliens who are detained are not required to register under Section 262 and have no occasion to under Section 265. Of course, excluded aliens who commit crimes here are considered within the United States for purposes of criminal prosecution.

v. *Cores*, which is presently pending before this Court, No. 455, October Term, 1957, may also be of some significance. There, an alien crewman who had been "permitted to land temporarily in the United States" (Section 252(a), 66 Stat. 220, 8 U.S.C. 1282) was charged in a criminal proceeding with willfully remaining "in the United States". Section 252(c).

In his Brief in this Court, the case being here on a question of venue under Article III of the Constitution, the Solicitor General concedes that the alien crewman (who had been *temporarily landed but not admitted*) "has the constitutional right to a jury trial 'in the State' and 'district wherein the crime shall have been committed'." (Brief, p. 14, and fn. 8, p. 16 citing *Wong Wing* v. *United States*, 163 U. S. 228).

These three applications of the phrase *(with)in the United States*, one by the Service, one by Congress, and the third by the Solicitor General, each treat aliens who have not been *admitted* to the United States (in two instances, aliens who have also been ordered excluded) as being in the United States within the contemplation of a specific law. The caution which this Court uttered in *Brownell* v. *Tom We Shung*, *supra*, against chameleonic usage of statutory language seems pertinent here. For if these aliens, two of them excluded and paroled and the third without the status of an admitted alien, are to be regarded as being in the United States, the suggestion that Congress intended respondents to be treated under a legal fiction, as being outside the United States, must be justified with more support than the petitioner has offered.

In view of the foregoing considerations, respondents submit that there is no language in Section 212(d)(5) which dictates the conclusion that paroled excluded aliens are not within the United States. Rather, the contrary is so.

(C) For his third contention, petitioner states that "Decisions of long standing have settled the principle that mere physical presence within the boundaries of this country does not change the status of an alien applying for admission". (Gov't 21)

The error in the formulation of the issue here as one of status in applying for admission has been discussed above. But because petitioner relies so heavily upon language in *Kaplan* v. *Tod*, and the decisions in *Ekiu* v. *United States*, *United States* v. *Ju Toy*, and *Shaughnessy* v. *Mezei*, we believe it appropriate to review those decisions and to show that they do not control the issue here.

The question in *Ekiu* was whether the alien's admitted right to challenge the lawfulness of her detention in a habeas corpus proceeding carried with it as a right of due process a judicial determination of the factual issues as to her excludability. The statute vested those issues exclusively with executive officers. This Court upheld the power of Congress to vest factual determinations exclusively with the executive as being coequal with its power to vest the determination in courts (660). The decisions of such officers, the Court stated in celebrated and oft-repeated language, "*acting within powers expressly conferred by Congress* are due process of law" (660). That her detention was in a mission house, rather than on a steamship, left her "right to land in the United States as if she had never been removed from steamship." [13] (662)

In *Ju Toy* the question was identical. Its difference from *Ekiu* was in that the fact for which judicial determination was sought was Ju Toy's claim to be a citizen, rather than, as Ekiu, the wife of one. The Court held that this difference did not distinguish the case. Finality of administra-

[13] Section 8 of the relevant statute provided that "such removal shall not be considered a landing". *Ekiu* v. *United States*, fn. at 653.

tive determinations of fact, absent allegations of abuse of authority (260-261), applies to all facts, domicile, citizenship, or exceptions to excluded classes. (262)

In *Mezei*, the question was the right of an excluded and indefinitely-detained alien to a hearing when the executive officers determined that to give one would be prejudicial to the public interest. This Court found that the denial of a hearing was a procedure authorized by Congress (210, 211). (Passport Act of 1918, as amended, 22 U.S.C. 223, as implemented by 8 C.F.R. 175.57), and therefore due process as to an alien denied entry. Mezei's temporary harborage at Ellis Island, like Ekiu's detention at a mission house, gave the alien no greater right to have the "courts retry the determination of the Attorney General", inasmuch as "Congress meticulously specified that such shelter ashore 'shall not be considered a landing'." (215)

Ekiu, *Ju Toy*, and *Mezei* therefore concern the constitutional rights of due process as to excluded aliens who were held in detention at the port of entry. The aliens there challenged the procedures which Congress had authorized as being violative of due process. Respondents here seek only to determine what Congress has authorized, a far different, a far easier question.

Kaplan v. *Tod*, although before this Court in a context in which due process rights were in question, posed two issues each of statutory construction. The first was whether an excluded alien whose deportation had been suspended because of World War I and who was transferred to the custody of an immigrant aid society "dwelt within the United States" within the meaning of a naturalization statute so as to have acquired citizenship. The second question, if alien were not dwelling in the United States, was whether she had entered or was "found in the United States in violation of immigrant authorities", (230, 231) so as to

have obtained immunity from deportation under a five year statute of limitations.

The issue here, of course, is not whether respondents are *dwelling* in the United States, or whether they have *entered*, or whether they are *found here in violation of immigration laws*. Nor, if statutory construction is to be related to the congressional purpose, can the respondents, who seek only a stay of deportation to a country in which they believe they will be subject to physical persecution, be assimilated to the status of a person who claims citizenship or the right to remain in the United States permanently.

If *Kaplan* v. *Tod* has "continuing vitality" (*Dong Wing Ott* v. *Shaughnessy*, 247 F. 2d 769, 770 (C.A. 2) petition for certiorari pending, No. 665, this Term), it is not sustained by transplanting its concepts mechanically to any situation involving excluded aliens. As we have observed above the posture of the alien, the questions posed, and the statutory language are what bear on the issue. Manifestly, whether an alien is "in the United States" for the purpose of securing relief from deportation to a particular country is not inexorably governed by the same consideration which determines whether an alien is dwelling in the United States so as to become naturalized, or which determines whether he has entered the United States so as to be immune permanently from deportation to any country.

What should have continuing vitality is not an "encysted phrase" from *Kaplan* v. *Tod*, but its author's reliance upon unceasing critical analysis as a judicial tool rather than dogmatically-applied quotations. (Frankfurter, J. concurring in *Dennis* v. *United States*, 341 U.S. at 543).

An analysis of the decisions which petitioner has cited, for the reasons given above, does not bear out his contention that respondents are not "within the United States" within the meaning of Section 243(h).

IV

There Are No Policy Considerations Which Restrict Stays of Deportation on Grounds of Physical Persecution to Expelled Aliens Only.

Apart from the questions discussed above, two other observations made by the petitioner are of doubtful validity. He suggests (Gov't. 18-19), that there are "obvious reasons why Congress would make provision for withholding of deportation on the ground of persecution only to deportation (i.e. expulsion), not exclusion".

The first group, petitioner says, may "have resided in the United States for many years" and are therefore to be preferred to those who "merely seek to enter from a foreign country". The distinction which petitioner makes in his construction of the Act, of course, is not the number of years an alien has lived in the United States, but whether he is deportable in exclusion proceedings or in expulsion proceedings. Petitioner's construction of 243(h) would make the relief it affords available to the alien who had "illegally passed through our gates" (*Shaughnessy* v. *Mezei*, 212) and was subjected to deportation proceedings the day after his illegal entry, but deny the relief to Jew Sing, who had lived in the United States from 1921 to 1947, and who had served in the United States Armed Forces during World War II, merely because on his return to this country, after a five month trip abroad, he was ordered excluded. (See Transcript of Record in this Court, *Jew Sing* v. *Barber*, No. 18, October Term) (See also *Fon* v. *Rogers*, Civil Action 2179-54, United States District Court for the District of Columbia, further proceedings stayed by stipulation pending disposition of the case herein, which similarly involves a Chinese excluded alien with long prior

residence in the United States and honorable wartime service in the United States Armed Forces.)

It can scarcely be maintained that it is "obvious" that Congress preferred expellable aliens to excluded aliens in view of the diverse situations of the aliens who come within the two categories.

The legislative history of section 243(h) does not support the Government's contention. When the Hobbs bill (H.R. 10, and S. 4037, 81st Congress) was before the Senate, Senator Graham of North Carolina called a subcommittee meeting to consider the question of deporting aliens to places where they might be persecuted. The hearings of this meeting have never been published. Congressman Hobbs and counsel herein, Jack Wasserman, were the only witnesses invited. Congressman Hobbs observed that there was no necessity to forbid deportation to a place of persecution since the Immigration Service had never attempted to deport under such circumstances.[14] No distinction was made between excluded or expelled aliens. The subcommittee approved a statutory prohibition against such deportation in the belief that it was declaratory of existing immigration practices.

The second observation is that Section 243(h) is "not part of any long-established, well-recognized right of an alien, resident or non-resident". (Gov't 12)

Petitioner clearly misreads history.

The right of asylum has been granted from ancient times. It was an integral part of Talmudic law, as well as of the Greek, Roman and Cannon law.[15] Political writers in England and English courts have from time to time voiced the

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[14] See *U. S. ex rel. Weinberg* v. *Schlotfeldt*, 26 F. Supp. 283 (D.C. N.D. Ill. 1938) where judicial intervention was required to prevent deportation of a Czech Jew to Nazi controlled Czechoslovakia.

[15] Charles Recht, *The Right of Asylum*.

inviolability of the concept of asylum in English law. Chief Justice Campbell said of this right:

> "It has been the glory of this country to afford it to the persecuted foreigner. That is the glory which I hope will ever belong to this country." [16]

Our Pilgrim Fathers, political and religious refugees, came to America in this tradition. In 1641 they wrote into the Body of Liberties of the Massachusetts Colony, the principle that people fleeing "from the tyranny or oppression of their persecutors * * * shall be entertained and succored amongst us".[17]

George Washington in his Thanksgiving Proclamation in 1795, besought "blessings * * * to render this country more and more a safe and propitious asylum for the unfortunate of other countries." [18] Every President from George Washington to Dwight D. Eisenhower has been confronted with some problem of granting asylum to political refugees.[19] Generally, these problems have received sympathetic consideration. Outstanding have been the cases of French monarchists during Jefferson's administration; of Polish, German, and Irish refugees during Jackson's term of office; of German, Irish and Hungarian influxes during Polk's, Taylor's and Pierce's administrations, of Cubans during Grant's, of Austrian and Russian Jews during Theodore Roosevelt's two terms; of Germans and Austrians during Franklin Roosevelt's administration; of Oswego refugees,[20]

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[16] *Regina v. Besnard*, 8 State Trials, N. S. 1055, 1061.

[17] Charles Recht, supra, p. 16.

[18] I Richardson's, Messages of the Presidents, 179-180.

[19] See Frances Reinhold, *Exiles and Refugees in American History*, The Annals, May 1939.

[20] The Oswego refugees were brought here as parolees from Italy upon the order of the President dated June 9, 1944. See Hearings before the House Immigration Committee pursuant to H. Res. 52, 79th Cong. 1st Sess. June 25 and 26, 1945, p. 2.

Estonians[21] and displaced persons during Truman's terms and of Hungarian refugees during Eisenhower's administration.[22]

Our background is therefore rich in according asylum to aliens—even to parolees. We would never dream of executing these aliens while they remained on our shores: neither our conscience nor our laws would sanction such conduct. Should we close our eyes to their death by approving their transfer to communist hands? We submit that here, too, such action is not within the limits of our laws, our traditions, or our conscience.

V

Except for Yen Mok, the Respondents Are Governed by the Immigration Act of 1917 as Amended by the Internal Security Act of 1950.

Four of the respondents arrived in the United States prior to the effective date of the Immigration and Nationality Act of 1952. They were subject to exclusion proceedings under the Immigration Act of 1917. See 8 U.S.C. 1225. By operation of the savings clause in Section 405 of the 1952 Act, supra, the respondents therefore are subject to the deportation provisions of Sections 18 and 20 of the 1917 Act, 8 U.S.C. 154, 156. *United States* v. *Menasche*, 348 U.S. 528.

Inasmuch as they were not "immediately sent back", their deportation must be governed by the provisions of Section 23 of the Internal Security Act. *Chong* v. *McGrath*, *supra*. The language of that Act refers to deportation

[21] In 1945 Estonian refugees from communism landed at Miami in frail vessels in which they crossed the ocean. We paroled them into the United States and refused to return them to the communists.

[22] After the Hungarian revolt against communism of October, 1956, thousands of Hungarians fled their homeland. Thereafter, together with other United Nation's countries, we accepted some of these refugees as parolees.

of an alien under "any provisions of this Act", 64 Stat. 1010, 8 U.S.C. 156, rather than to the deportation of aliens "within the United States". Thus, even if the respondents be deemed "in legal contemplation" not within the United States, they are nonetheless aliens who are being "deported under . . . provisions of this Act".

Respondents believe that the statutory language clearly reaches them. But even if this is not so, the Government concedes that there is what it terms an "ambiguity" (Gov't. Brief p. 25) in view of the fact that the relevant term *chapter* (Act) in the earlier statute "included exclusion provisions as well as those pertaining to deportation proper" (i.e. expulsion).

Ambiguities in deportation statutes, as we have noted earlier, are resolved in favor of the alien. Certainly, this should be so when the issue is a stay of deportation to countries where physical persecution may ensue. *Fong Haw Tan* v. *Phelan, supra.*

VI

The Issue of Parole Is Not Before This Court

Respondent, Jimmie Quan, agrees with petitioner that the issue whether the allegation that the Attorney General refused to exercise discretion to continue his parole status is not before this Court, the matter not having been decided by the lower court or brought here. (Pet. 7).

Respondents welcome, however, the concession made by the Solicitor General, and made for the first time in this Court, that they are entitled to the exercise of the Attorney General's discretion under Section 212(d)(5). But they dispute the implication that their applications for parole upon the ground of physical persecution, have had the benefit of his exercise of discretion. (Pet. 5, 6), or that Jimmie Quan's complaint has been "cured". (Pet. 7)

Although opportunity to file the parole applications upon the ground of physical persecution was afforded the respondents for the first time after their cases were brought to this Court, neither hearings nor interviews were granted them, and the denials of their applications were made simultaneously by the District Directors, in whom the regulations reposed the authority to act, in San Francisco and in New York without stated reasons given.

In addition, it should be noted that Chinese nationals who are in like circumstances, except for the fact that they have been ordered expelled from the United States rather than excluded, have as a matter of policy been granted stays of deportation "pending receipt of official information" regarding the nature of physical persecution in Communist China.[23] See Matter of Lee Sung, A-7921505, reproduced Petitioner's Brief, companion case of *Leng Ma May*, v. *Barber*, No. 105, October Term, p. 18. Nothing appears to justify the distinction in treatment between the respondents' applications for parole and the applications of expelled aliens for stays of deportation.[24]

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[23] Note should be made of the criticism of Immigration practices by the House Immigration Committee which reported: "It is feared that application for 'withholding of deportation' was denied in many cases where threat of physical persecution in the country to which the deportee is destined may have been claimed with a reasonable degree of probability. . . .

There seems to be no set policy covering the exercise of discretionary power vested by the law in the Attorney General, yet delegated by him to lower grade officers of the Immigration and Naturalization Service, who do not appear to be properly educated and trained to judge the difficult and involved element entering into the cases before them under the said section." *Report on the Administration of the Immigration and Nationality Act*, House Judiciary Committee (1955) p. 69.

[24] The Commissioner of the Immigration and Naturalization Service informed the House Appropriations Committee (Hearings, 85th Cong. 1st Sess. Department of Justice Appropriations, pp. 172-3):

"We have held off further deportation of these two races (Chinese and Yugoslavs) until July 1, because we are receiving a great deal

Moreover, it should be noted that although the Solicitor General has conceded here that 212(d)(5) parole relief is available for excluded aliens whose deportation would result in physical persecution, the petitioner has not yet adopted the Solicitor General's position as a policy in any of the cases pending in the lower courts. Respondents' present counsel represent approximately 30 other Chinese aliens who are in like position, none of whom have been permitted the opportunity to submit applications for parole. Their cases are pending in the United States District Court for the District of Columbia, awaiting the outcome of the present case. See *Wong Fon et al* v. *Rogers, supra; Hom Dot Ton et al* v. *Rogers*, C.A. 3729-54; *Lee Hong Dick et al* v. *Rogers*, C.A. 5653-55; *Chiu Yuan Ming* v. *Rogers*, C.A. 668-56; *Leong Bing Ling* v. *Rogers*, C.A. 336-57; *Wong Bing et al*, v. *Rogers*, C.A. 2420-57; and *Cheung You* v. *Rogers*, C.A. 37-56.

The alleged consideration of the respondents' request for continuation of parole can, in view of the issues here and the record below, have no bearing on the question before this Court.

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of very bad reaction from the public assuming that we are sending these people over there to be persecuted".

If the basis for the exercise of discretion is "the very bad reaction from the public", there is no distinction at all between the excludable aliens who have sought continuation of parole, and the expellable aliens who have obtained stays of deportation.

Conclusion

For the reasons set forth, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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